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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: METHYL TERTIARY BUTYL
4 ETHER ("MTBE") PRODUCTS
LIABILITY LITIGATION

00 MDL 1358
Master File C.A.
No. 1:00-1898(SAS)

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New York, N.Y.
October 22, 2012
4:10 p.m.

7 Before:

8 HON. SHIRA A. SCHEINDLIN

9 District Judge

10 APPEARANCES

11
12 WEITZ & LUXENBERG, P.C.
Plaintiffs' Liaison Counsel
13 BY: WILLIAM WALSH

14 MILLER AXLINE & SAWYER
Attorneys for New Jersey, Puerto Rico Plaintiffs
15 BY: MICHAEL AXLINE

16 LAW OFFICES OF JOHN K. DEMA, P.C.
Attorneys for New Jersey, Puerto Rico Plaintiffs
17 BY: JOHN K. DEMA
NATHAN SHORT

18 COHN LIFLAND PEARLMAN HERRMANN & KNOFF LLP
Attorneys for New Jersey Plaintiffs
19 BY: LEONARD Z. KAUFMANN

20 RAWLE & HENDERSON LLP
Attorneys fr Third Party Plaintiff Getty Properties
21 BY: SUSAN M. DEAN

22 McDERMOTT, WILL & EMERY
Attorneys for Defendants Exxon Mobil Corp.
and Defendants' Liaison Counsel
23 BY: JAMES A. PARDO
LISA A. GERSON
24
25

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1 APPEARANCES CONTINUED

2 SHEPPARD MULLIN RICHTER & HAMPTON LLP
Attorneys for Defendant Exxon Mobil Corporation
3 BY: JEFFREY J. PARKER

4 SEDGWICK LLP
Attorneys for Defendant Shell Oil Co.
5 BY: PETER C. CONDRON

6 KING & SPALDING
Attorneys for Defendant Chevron
7 BY: JEREMIAH J. ANDERSON

8 EIMER STAHL
Attorneys for Defendant Citgo Petroleum
9 BY: PAMELA R. HANE BUTT

10 McCONNELL VALDES LLC
Attorneys for Defendant Sol Puerto Rico Ltd.
11 BY: ALEJANDRO J. CEPEDA-DIAZ

12 BLANK ROME LLP
Attorneys for Defendant Lyondell
13 BY: FRANK A. DANTE

14 LIEBERMAN & BLECHER P.C.
Attorneys for Third Party Defendant HP Delta
15 BY: MICHAEL G. SINKEVICH, JR.

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(Case called)

THE COURT: I have the October 4th letter from Mr. Dema requesting a premotion conference to address Sol's alleged discovery deficiencies.

THE COURT: Is anybody here on the defense side representing Sol?

MR. CEPEDA-DIAZ: I am here, your Honor.

THE COURT: Who are you?

MR. CEPEDA-DIAZ: Alejandro Cepeda.

THE COURT: C-E-P-E-D-A?

MR. CEPEDA-DIAZ: That's correct.

THE COURT: And then I have the October 12th plaintiffs' preconference letter and the October 12th defendants' preconference letter.

On October 17th, I have the reply letters of plaintiffs and defendants and a separate reply letter from the City of Fresno.

I just received what was styled an in camera submission from Mr. Axline's firm regarding the City of Fresno case. It is dated October 17th, but it is also dated October 19th. So the first page says October 17th, the second page says October 19th. I don't think it was received by this office until today.

And then also today's date, I just received five minutes ago a letter from Ms. Lombardi of the Angelos law firm

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1 responding, to some extent, to the documents submitted by the
2 Miller Axline firm for the Court's in camera review.

3 I don't know if you have even seen this yet, Mr.
4 Axline, have you?

5 MR. AXLINE: I have seen it, your Honor.

6 THE COURT: We just got it five minutes ago. When did
7 you get it?

8 MR. AXLINE: About an hour ago.

9 THE COURT: I have to say, with respect to the October
10 19th letter from the Axline firm which we got today, and the
11 October 22nd letter that, apparently, came to you an hour ago
12 from the Angelos firm -- I have been on trial all day and I
13 have no idea, really, what these two letters say. And it is
14 simply not fair to expect the Court to do that on the same day.
15 We have discussed this before. That's why we have rules about
16 when submissions are to be made. We do have other cases, most
17 judges, and many of us work seven days and there is not an
18 eighth day in the week. So that's that.

19 Is anyone here from the Angelos firm? No.

20 Let's get started.

21 I moved the conference because I have an obligation
22 rather early this evening that I would like to get to.

23 The first one is, again, an update on the document
24 repository situation. I asked you to keep putting this item on
25 the agenda until I understand what has been done.

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1 MR. AXLINE: Yes, briefly, your Honor, we have
2 accumulated all of the defense references to earlier documents.
3 We broke them out into which firm the previously produced
4 documents were sent to. We produced a chart for each of those
5 firms. We sent a letter to each of those firms -- these are
6 plaintiffs firms -- saying, here are all the documents that the
7 defendants claim that they have sent to you. Would you please
8 provide them to us no later than November 1st.

9 We are getting responses in. I don't think any firm
10 has said we can't meet that deadline, so by November 1st, we
11 expect to have a complete set of the documents that the
12 defendants claim they previously --

13 THE COURT: And it will be available to all
14 plaintiffs' counsel in all cases?

15 MR. AXLINE: We have said that in our letter to the
16 firm saying, send us these documents, told them that we are
17 collecting all of these so that they will be available for all
18 firms.

19 THE COURT: But you will send a notice to all
20 plaintiffs' counsel that you know of that they can access them
21 either by contacting you directly whenever they want to?

22 MR. AXLINE: Yes. So that's the status.

23 THE COURT: Since they are supposed to do it by
24 November 1st, I will know at the next conference whether it is
25 done?

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1 MR. AXLINE: Yes.

2 THE COURT: Then there is a proposed case management
3 order in the Puerto Rico case. I understand it is a joint
4 proposal. It just seems so excessively long. The case is an
5 '07 case with a proposed final cutoff date, I guess, for expert
6 discovery of April 2014, another year and a half from now.
7 That does not seem to be wise. Where can it be tightened up?

8 Well, I suppose that one could start tightening right
9 at the beginning. Why is the deadline to add third parties
10 July 13 when we are here in October?

11 That is not really your issue, Mr. Pardo, that is a
12 plaintiffs' issue.

13 MR. AXLINE: That is a defense issue, your Honor.

14 THE COURT: To add third parties, right.

15 Mr. Pardo.

16 MR. PARDO: I will try to answer that.

17 May I just step back and address the opening
18 observation --

19 THE COURT: That it will be a seven-year case?

20 MR. PARDO: Right.

21 THE COURT: No. I think I know the background pretty
22 well. I am not sure that the plaintiffs pushed the case very
23 hard for a lot of years, but still and all, we are here in
24 October 2012. The case has been active and busy for at least
25 the last couple of years. I know that it has been on our

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1 active agenda for at least two years so it still seems too
2 long.

3 The reason I was concerned when I saw the deadline to
4 add third parties, usually we are talking about amending a
5 complaint to add defendants, but I understand this is any
6 defendants that the defendants would like to add as third party
7 defendants. Why should that be July, because everything seems
8 to flow after that? If I got that date where it should be by
9 January or February, I start moving many things up by many
10 months. It is not right that it is going to take another year
11 and a half to have this case teed up. It is just not right.

12 MR. PARDO: You may be right, your Honor --

13 THE COURT: I don't know may be right. If I don't
14 order this one but order my schedule, then that will be
15 schedule. Anybody who violates the schedule, I guess could
16 have their pleadings stricken. I don't know about may be.

17 MR. PARDO: Your schedule will control.

18 THE COURT: Yes, it will.

19 MR. PARDO: The reason I think that date is set where
20 it is set is because it will depend on the fact discovery that
21 will be taken on the sites.

22 Now, I will remind the Court what I think you probably
23 already know, which is that we only know -- and specifically I
24 think it was June 11th of this year -- as of June 11th finally
25 were able to define what the first tranche of this case was

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1 about. That's when we finally landed on what the trial sites
2 are, which is really what all of the site-specific discovery
3 tees off of.

4 Now, discovery proceeds significantly slower in Puerto
5 Rico for any number of reasons that your Honor is already aware
6 of than it has in New Jersey. That is nobody's fault. It is
7 just the way it is.

8 There are language issues.

9 We have had trouble just getting vendors to copy
10 documents.

11 There was a lot of turnover on plaintiffs' side in
12 terms of not the lawyers --

13 THE COURT: So what is proposed is close of fact
14 discovery a year from now and that is just on the trial sites?

15 MR. PARDO: That would be on the 19 trial sites and it
16 would also be any non-site-specific discovery.

17 THE COURT: It doesn't purport to be every site in
18 Puerto Rico?

19 MR. PARDO: No. If you look at to compare it to New
20 Jersey -- and this case has moved slower than New Jersey,
21 generally -- we had from the time trial site was selected in
22 New Jersey, by early last year, we had about 18 months to do
23 the fact discovery on those sites as well as the
24 non-site-specific discovery we needed to do in New Jersey.
25 Under the schedule both parties have proposed here from the

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1 time trial sites have been picked --

2 THE COURT: Which was when? You say June?

3 MR. PARDO: June 11, 2012.

4 And we are going to try to work this out with
5 plaintiffs, but there is actually even today one other issue
6 that we have with the trial sites. One of the sites we picked
7 is on their list of sites that they are going to dismiss, but
8 we have not had a chance to talk to them about that. We will
9 get that worked out.

10 We have under the schedule that we have proposed, 21
11 months from the time the trial sites were picked. Now, 21 is
12 more than 18, I will give you that, but Puerto Rico is a little
13 different than New Jersey. We know that things are going to
14 move much more slowly. And we simply have not been able to do
15 site-specific discovery because we have not had the sites
16 picked until June.

17 I hear you. It is a 2007 case. There has been a fair
18 amount of discovery done already on the non-site-specific
19 stuff, but we have spent a lot of time in the last year trying
20 to narrow the case, which we have been able to do, trying to
21 get rid of sites that we thought shouldn't be in the case
22 which, working with plaintiffs, we have been able to do.
23 That's where our focus has been. We have now picked the sites
24 that will be the first tranche for trial and, again, taking our
25 cues from New Jersey, we tried to build a schedule that at

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1 least on the front end, the fact discovery side, looks a lot --
2 as much as it can -- like the New Jersey case where we had 18
3 months.

4 In this case we said 18 months, let's be realistic.
5 We can't go in and ask for 36, three years, that won't fly. So
6 we talked. We said we think that 21 is doable. I know that it
7 pushes us out a ways, but given the realities of Puerto Rico,
8 your Honor, I respectfully submit, it is probably aggressive,
9 but it will get done.

10 THE COURT: I will issue the schedule that I will
11 issue.

12 Do you want to say anything else?

13 I am not going to do it on the spot. I will issue a
14 schedule. I will sign it, and that's the Court's order.

15 MR. AXLINE: I just wanted to share with you some of
16 the practical problems we are facing.

17 THE COURT: I know you always have translation issues,
18 among other things. And a lot of things are not stored
19 electronically, I know that too.

20 MR. AXLINE: Even just for the basic station operator
21 depositions where we have to prepare to take a deposition of
22 what would ordinarily take 10 days to prepare for, we have to
23 have thousands of pages of documents translated --

24 THE COURT: Then drop the case, that's all I know.
25 Nobody told you you had to bring it.

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1 MR. AXLINE: In fairness, your Honor, the plaintiffs
2 have identified some new parties that we intend to bring to the
3 Court's attention at the next status conference.

4 THE COURT: You want to add some defendants. That I
5 am not surprised by, plaintiffs want to add defendants. When
6 do you want to do that by? Usually there is a cutoff for
7 amending a complaint to add new parties.

8 MR. AXLINE: We will identify them before the next
9 status conference and ask for you permission to file a motion.

10 THE COURT: I don't need a motion. If you are going
11 to add any defendants, you just need to have a cutoff date. Is
12 December 1st acceptable, I would think?

13 MR. AXLINE: Yes.

14 THE COURT: December 1st to add any new defendants.
15 How many do you think you might be adding?

16 MR. AXLINE: No more than 10.

17 THE COURT: Are these local stationary people or big
18 oil companies?

19 MR. AXLINE: These are large international companies
20 that it turns out as we are going through the discovery
21 supply --

22 THE COURT: What is the largest you can think of as an
23 example, just give me an example.

24 MR. AXLINE: International company Vitol S. A., I
25 think is one of them. There is a Shell-related company that's

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1 European based.

2 THE COURT: The next topic on the agenda is the
3 deadline for defendants' submission of ESI search terms. And I
4 was led to believe that the parties were trying to reach
5 agreement on this issue and I don't know if you did.

6 MR. DEMA: Yes, your Honor. I think that the parties
7 are essentially in agreement on this issue. In fact, all the
8 defendants but for Lyondell and Citgo, who promised to give
9 their ESI terms over today, have exchanged and we have been
10 working well together.

11 THE COURT: So what about the last two? What about
12 Lyondell and Citgo?

13 MR. DEMA: The deadline was today that we agreed with
14 them and the day is not over.

15 THE COURT: But is anybody here to speak on behalf of
16 Lyondell or CITGO, whether they are going to join in this
17 effort to get the search terms by today?

18 You are?

19 MS. HANEBUTT: Pamela Hanebutt on behalf of CITGO
20 Petroleum. We indicated that we don't have any ESI terms to
21 give them because, with respect to this particular set of
22 discovery, we had no ESI that hadn't already been produced and
23 we turned over our hard copy documents.

24 THE COURT: Then you can't be heard to complain later
25 that the search terms weren't appropriate, right? Maybe you

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1 are not adding any, you are living with the ones that other
2 defendants have asked for for use, right?

3 MS. HANEBUTT: To the extent that they propounded
4 additional discovery, we would have to make sure that the terms
5 that other defendants have proposed match our system.

6 THE COURT: You are?

7 MR. DANTE: Frank Dante from Blank Rome on behalf of
8 Lyondell, and we will be sending our search terms this
9 afternoon.

10 THE COURT: So I think that takes care of that agenda
11 item.

12 The next situation is Sol which involves you,
13 Mr. Cepeda. The plaintiffs still say that Sol has not provided
14 the discovery that it promises to do. So, for example,
15 plaintiffs say they have been requesting ESI from Sol since
16 September 15, 2008 and from November 2011 to May 2012, they
17 have asked me to confer.

18 Sol responded on June 6, 2012 that it would produce
19 ESI and an index by August 15, 2012. And here we are at the
20 end of October and it has not done so, right?

21 MR. CEPEDA-DIAZ: That's correct, your Honor.

22 THE COURT: What is that about? How can you promise
23 to do something and two and a half months later say, that's
24 correct, we didn't do it?

25 MR. CEPEDA-DIAZ: Your Honor, we have run into some

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1 issues, technical issues with converting these files into the
2 appropriate format for production and this has slowed our
3 ability to be able to get these files --

4 THE COURT: You seem to think that the way to do this
5 is to have no deadline, you will get to it when you get to it,
6 and any court deadline will be ignored anyway. So if I said
7 absolutely the last drop-dead date is November 9, if you can't
8 make it, you will say, we tried but we couldn't, right?

9 MR. CEPEDA-DIAZ: No, your Honor.

10 THE COURT: What would you do?

11 MR. CEPEDA-DIAZ: Right now, we would just ask for
12 another 45 days.

13 THE COURT: Denied. I have had it with Sol. That's
14 one failure.

15 Another one. Failure to produce archive documents in
16 response to an 2008 discovery request.

17 In pretrial order 58A which was issued in February
18 2010, you were ordered to review certain archive documents that
19 you identified as potentially responsive.

20 Plaintiffs say that they received nothing for two
21 years, but then they received more than 105,000 pages on
22 roughly 30 disks, but they still don't know whether that is
23 everything and which interrogatories or document requests these
24 105,000 documents respond to.

25 MR. CEPEDA-DIAZ: That part was taken care of last

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1 week. We gave them a supplemental response which identified
2 documents.

3 THE COURT: Is that right, Mr. Dema, Mr. Short, you
4 got the supplemental response that explained which request
5 these documents were responding to?

6 MR. SHORT: Your Honor, I don't recall seeing any
7 Bates ranges that are referenced for any particular
8 interrogatories or documents requests. I don't recall seeing
9 that.

10 THE COURT: You do recall the supplemental response?

11 MR. SHORT: Vaguely -- I'm sorry -- no, I don't
12 specifically. But I do not recall seeing any Bates range that
13 would lead us to the documents that are individually responsive
14 to --

15 THE COURT: You don't have a hard copy of that
16 supplemental response with you?

17 MR. CEPEDA-DIAZ: No. I don't have it with me.

18 THE COURT: And it was served when?

19 MR. CEPEDA-DIAZ: I believe it was on the 10th of
20 October. If I am not mistaken, it was served by Lexis-Nexis.

21 THE COURT: You say it does give Bates ranges?

22 MR. CEPEDA-DIAZ: It does.

23 THE COURT: Document X to Document Y in response to
24 question 10?

25 MR. CEPEDA-DIAZ: At least until the 105,000 that we

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1 have been able to produce today.

2 THE COURT: Is that complete? They said that they
3 don't know whether the 105,000 represents all or some.

4 MR. CEPEDA-DIAZ: That's most of it. I believe that
5 the total is 130.

6 THE COURT: And when is the remaining 25,000 coming
7 in?

8 MR. CEPEDA-DIAZ: It should be coming in the next few
9 weeks, your Honor. Again, it is a technical issue with
10 converting --

11 THE COURT: I'm sorry. At some point deadlines are
12 set and if they are not, the consequences are paid.

13 Then there was a document request served on July 8,
14 2011 that requested leases, contracts, franchise agreements as
15 to each site.

16 They say you have produced maybe three documents but
17 no agreements that are earlier than 2006.

18 MR. CEPEDA-DIAZ: There were documents produced that
19 responded directly to the focus sites. We supplemented that
20 response back in July, I believe.

21 THE COURT: They say that there is a total of three
22 responsive documents. Is that accurate?

23 MR. CEPEDA-DIAZ: No. In addition to that, we
24 submitted the contracts that Sol has with -- the purchase
25 agreement whereby Sol acquired what used to be the Shell

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1 company Puerto Rico Limited, and there is a marketing and
2 trademark agreement through which Sol continues to distribute
3 Shell brand of gasoline in Puerto Rico. But those are all
4 markets with other parties, not directly with the sites. And
5 for those, they are dated 2006. We don't have documents that
6 predate 2006.

7 THE COURT: You have nothing that predates 2006?

8 MR. CEPEDA-DIAZ: We have not found any. It was a
9 different company then. The company distributed gas in Puerto
10 Rico for a few years before then. At least between Sol and any
11 Shell entities, but with respect to the focus sites, the
12 response, I believe it was RV 29, the focus sites, the Bates
13 ranges were given where those documents could be found.

14 THE COURT: As I understand the answer, they have
15 searched and they are not able to find anything pre-2006. If
16 things don't exist, there is nothing more I can do.

17 MR. DEMA: I would agree, your Honor. I would just
18 like that representation as part of their formal discovery.

19 THE COURT: It is also on the record here.

20 Do you want him to respond to the July 8, 2011
21 document request with a responsive pleading that says response
22 to document request and says, we were not able to locate any
23 documents other than the few we produced to you?

24 MR. DEMA: Usually that is either for deposition
25 purposes --

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1 THE COURT: Make it a formal pleading then. Make it a
2 response to July 8, 2011 request and say that you produced
3 everything that you can find and you have looked everywhere and
4 cannot find any responsive documents pre-2006, and that you
5 have produced everything else.

6 Now, we have a form of production problem. It says
7 that when you produced documents in response to plaintiffs'
8 non-test site discovery, you produced a single 14,000-page PDF
9 file without load files with no metadata. It can't be used.
10 It is not formatted in a usable way. So it is a failed
11 production. It has to be done again and done right.

12 We don't accept productions in a format that is not
13 usable. That's the Federal Rules of Civil Procedure and there
14 are opinions now out there that talk about how files have to be
15 produced -- at least one of them is mine, but others have
16 written about it too. You have to produce TIFFs with load
17 files, with minimum metadata so that people can tell what
18 documents go with which other ones and where the breaks are
19 between documents.

20 It is just not an adequate production. You have to
21 redo it.

22 MR. CEPEDA-DIAZ: We will but, like I said, we have
23 been having issues with this conversion --

24 THE COURT: You keep saying that you will. I will set
25 a date and it is a drop-dead date.

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1 MR. CEPEDA-DIAZ: But the PDF was served. It did have
2 Bates stamps on them and --

3 THE COURT: It is useless. It is one continuous
4 14,000 page PDF file. That is not a usable or acceptable form
5 of production.

6 The are enough opinions out there, form of production,
7 all you have to do is find them, but I will tell you what it
8 says. It says TIFFs with load files and minimum metadata
9 fields so people can tell what the documents are, where they
10 start and where they end -- just for starters.

11 They also say that you have not responded at all to
12 the fourth set of discovery requests where the response was due
13 August 30th. What about that one?

14 MR. CEPEDA-DIAZ: Your Honor, we have had issues
15 responding to that as well. The attorneys were basically
16 working on the discovery responses before and we had to bring
17 in new people and get them up to speed and it has all been
18 delayed, but those should be coming out this week.

19 THE COURT: Look. It is an impossible situation, but
20 given the lengthy schedule you are all proposing anyway, it is
21 somewhat harmless. So what I would say is, that it is time, as
22 I said, to have a drop-dead date after which time you can make
23 a motion for any type of sanction you want. It is not really a
24 motion to compel. At this point it would be a motion for
25 sanctions. The motion to compel is orally granted. Obviously,

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1 they have to do all of this. We have covered each problem
2 today on the record.

3 So the new drop-dead date is Friday, November 30th.
4 If by Friday, November 30th you don't get the materials that I
5 said you have to get at this conference, you may move for
6 sanctions at all levels of sanctions, whatever you deem
7 appropriate.

8 Now we turn to defendants' agenda items.

9 There seem to be three disputes that remain to New
10 Jersey. The first is the remedial priority system requests. I
11 have already had a long discussion about this. The remedial
12 priority system exists to assist New Jersey DEP to determine
13 which sites require regulatory oversight. DEP assigns sites
14 rankings and uses that ranking to determine how to allocate its
15 own resources but it is not used to evaluate compliance with
16 the remediation obligations.

17 So after we discussed this at some length at a prior
18 conference, I held that the background information sought by
19 defendants was not relevant and I struck the 30(b)(6) notice,
20 but I did say that certain site-specific information could be
21 sought, and it comes out of that July 31, 2012 transcript at
22 pages 66 through 67. I don't know if it is worth reading into
23 the record, you probably know it. Maybe I should, just to be
24 complete. This is what I said then, that for the 19 sites, if
25 they are ranked, I think that defendants are entitled to know

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1 what digitized deposition interrogatory, what's the range, was
2 it 1, 2, 3, 4, 5, and if there is a document explaining those
3 rankings, give them the document.

4 So like the last ruling, send out a document request
5 that has one request and one interrogatory and ask for the 19
6 sites, what was each one ranked -- for the document request, is
7 there a final document that explains how the rankings are
8 developed and what they mean. That, I would allow -- no
9 depositions.

10 Then there was an August 23rd deposition of a DEP
11 employee, a Mr. Crammer, and he did testify that DEP had
12 generated RPS information and calculations for each of the 19
13 trial sites and went into detail regarding what type of
14 information had been generated.

15 Then the defendant sent DEP a letter requesting
16 additional RPS related data. And the parties are in a dispute
17 as to which of this data is relevant and site-specific or just
18 trying to get reargument on my prior ruling.

19 So I don't see a reason to change my prior ruling. It
20 seems to me defendants are entitled only to the site-specific
21 input data that DEP uses to generate the rankings, but not the
22 DEP's subsequent calculations or the details of how the RPS
23 functions because this is only relevant to the failure to warn
24 claim up until the time that DEP became aware of MTBE's alleged
25 negative effects, but not what happens after that. It doesn't

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1 bear on that failure to warn claim.

2 You both seem to be confused and wish to be heard, Mr.
3 Kaufmann, or not?

4 MR. KAUFMANN: No, if you stop there, I don't think I
5 need to say anything else.

6 THE COURT: Mr. Pardo.

7 MR. PARDO: I hope that I am not confused, but I do
8 want to make sure that the record of what you just said is
9 clear. We are not seeking to reargue anything. We just want
10 the ruling that we think your Honor entered last time and has
11 since repeated here enforced.

12 What we understood the Court to have said then and now
13 is that we are not allowed to go ask general questions about
14 RPS and what it is doing or how it is set up -- none of that
15 macro type stuff -- but for the 19 trial sites, we are entitled
16 to know not only the score, but what's the data that the state
17 has used and input into this model that they have to generate
18 those scores.

19 THE COURT: But that would be in a linear analysis up
20 to a point in time -- you said it just now, to generate the
21 rankings, but then not further application -- if there is
22 subsequent calculations, not that.

23 MR. PARDO: Understood. Of course, there is a general
24 duty to supplement. I mean, if those numbers are as Mr.
25 Kaufmann represents them to be preliminary, not final -- I

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1 understand they are. In fact, their own web site says that
2 these numbers are intended to be updated every six months, so
3 they are never going to be final, final. As long as
4 investigations are going on those numbers will be changed every
5 six months or so and --

6 THE COURT: Yes, but that is what you are not entitled
7 to because that is not the purpose of these rankings, as I
8 understand it. It is to determine internally how to allocate
9 resources, not to evaluate compliance with remediation
10 obligations. That's what I said twice, right?

11 MR. PARDO: Right.

12 THE COURT: So it has limited relevance, and I said
13 that. I said, what is the ranking, and if it is constantly
14 updated and changing, I am not sure what relevance that really
15 is to you. At one time a ranking was developed for certain
16 limited purposes, which we discussed, to allocate resources is
17 not an evaluation tool to check compliance, which I think you
18 are trying to turn it into.

19 MR. PARDO: Actually, no, I am not. What I am most
20 interested in, I think, how they allocated for their own
21 compliance purposes is for them.

22 THE COURT: Right.

23 MR. PARDO: What we are really interested in is the
24 inputs that they are using. So, for example, they have values
25 that they have assigned to determine something called the MTBE

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1 exceedance quotient at a specific site.

2 So for the 19 sites there is a number, a quotient
3 called the MTBE exceedance quotient which is based on some
4 input for MTBE solubility, for MTBE mobility, for MTBE
5 degradation -- all of these characteristics of MTBE that you
6 heard about.

7 THE COURT: What was the first one?

8 MR. PARDO: Solubility, how it breaks down.

9 You have heard these words for 15 years now. They
10 have values for them. And of course they have brought a case
11 where they are contending certain things about those
12 characteristics of MTBE.

13 And our argument is that we are entitled to know what
14 values the state itself is putting on those particular factors.
15 Now, we are not asking for it statewide. It is just for the 19
16 sites. There's a site ranking, a site conditions score, a site
17 pathway score that they come up with.

18 That's the information we want for these 19 sites, and
19 I think that your Honor was clear at the last conference in
20 July that --

21 THE COURT: I have said that you are entitled to
22 site-specific input data that the DEP used to generate the
23 rankings. But my concern is, you say continues to change, it
24 has to be updated every six months. I am not sure what that
25 goes to after a while. The original input data, I understand.

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1 I don't know what the change would be. Why would it change?

2 Is there new data being input in terms of these words
3 that you just said, starting with solubility and then you said
4 two other words.

5 MR. PARDO: I think I feel like I might be close to
6 making Mr. Kaufmann's argument, but I am happy to make it for
7 him because I won't do as well as he might.

8 I think what Mr. Kaufmann has argued, correct me if I
9 am wrong --

10 MR. KAUFMANN: I am going to go back to this table.

11 MR. PARDO: I want to take my seat at that table.

12 I think what he has said -- and I get it because we
13 deal with this all the time on our own sites -- you do an
14 investigation, but it is an ongoing investigation. Remediation
15 is ongoing. Site conditions change.

16 You said it yourself at the last conference in the
17 context of delineations. The world is not static. Things
18 change. So as things change and the state gets more
19 information, it gets put into that model and that site score --
20 The site might start off at a 5 and become a 3. It may become
21 a 1. It may come off. It becomes less of a priority or it
22 could go the other way.

23 For right now, though, I hear you and I take your
24 point. We are entitled at least right now to the data that
25 they have and the scores they have generated. Whether we are

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1 entitled to get the new data or the updated scores, I don't
2 know.

3 Actually, eventually some of this, I suspect, will be
4 will be publicly available anyway, although it is not now. For
5 now, we can only get it in discovery --

6 THE COURT: When does it become publicly available?

7 MR. KAUFMANN: We believe, the plan is, by the end of
8 the year.

9 THE COURT: End of 2012?

10 MR. KAUFMANN: Yes.

11 THE COURT: It will be publicly available to anyone?

12 MR. KAUFMANN: The scores are expected to be.

13 THE COURT: The score, but that would not tell us the
14 input data anyway?

15 MR. KAUFMANN: The input data that we have now, we
16 have told them that we will give them. We have said that all
17 along. That is not a problem.

18 Data to me are facts. We are happy to share with them
19 any facts that we have. What they are asking for now are sort
20 of evaluative process and that's what --

21 THE COURT: That's what I don't think I have ever said
22 you are entitled to. I said you were entitled to this data. I
23 have used the word "data" repeatedly -- the input data not the
24 evaluation.

25 MR. PARDO: You have said this, and I don't

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1 understand. I think we just want the data.

2 THE COURT: Apparently, this is resolved. The input
3 data has to be produced that you have now. The only open item
4 is if the data changes, will you update it six months from now?
5 It should be publicly available anyway. You certainly should
6 turn it over, and there may be no good argument not to turn it
7 over, public or not. But it remains just the data, not the
8 internal evaluation what to do about that.

9 MR. PARDO: Understood.

10 MR. KAUFMANN: The other two items under this
11 category --

12 THE COURT: One was the 30(b)(6) request.

13 MR. KAUFMANN: I think that we have agreement on dates
14 that we would ask the Court to sign.

15 THE COURT: What is it?

16 MR. KAUFMANN: One of them is October 31st and on the
17 costs it is November 9th.

18 THE COURT: On the other one?

19 MR. KAUFMANN: One issue has to do with some costs
20 information, and that was November 9. That was from the
21 deposition --

22 THE COURT: That will be November 9th, and then?

23 MR. KAUFMANN: The other is October 31st.

24 THE COURT: What is that one for?

25 MR. KAUFMANN: That was for some of the site

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1 information, skyline --

2 THE COURT: OK, and that will be October 31st.

3 MR. KAUFMANN: Yes, your Honor.

4 MR. PARDO: We actually have a proposed order.

5 THE COURT: All right.

6 MR. PARDO: Mr. Kaufmann, you have seen this, right?

7 MR. KAUFMANN: Yes, I have.

8 THE COURT: Now, there is this issue about
9 Dr. Costanza. Is there a real dispute left there because, as I
10 understand it, the plaintiffs really don't object to the
11 defendants trying to attempt service of a so-called second
12 amended subpoena on Dr. Costanza, is that right?

13
14 (Continued on next page)

CAMTMB2

1 MR. KAUFMAN: We have no objection to that.

2 THE COURT: You don't object to that? Is there any
3 dispute left?

4 MS. GERSON: I don't believe so.

5 THE COURT: So that takes care of the Dr. Costanza
6 issue.

7 Expert deadline for third-party claims. Again,
8 defendants request and plaintiffs don't object that the Court
9 approve the following deadline for the exchange of expert
10 reports in the third-party action.

11 What is the third-party action?

12 MS. DEAN: Good afternoon, your Honor, Susan Dean, I
13 represent the defendant and third-party plaintiff Getty
14 Properties Corp. We joined three third-party defendants a
15 number of months ago.

16 THE COURT: Are you the only third-party plaintiff in
17 the case?

18 MS. DEAN: Yes.

19 THE COURT: Go ahead.

20 MS. DEAN: And we had not previously asked for expert
21 deadlines because the three third-party defendants were
22 actually the four that my client and the three third-party
23 defendants were involved in a state court litigation, and
24 expert reports had been produced in that lawsuit. That lawsuit
25 has been stayed since the joinder of those parties in this

CAMTMB2

1 action. And over the course of discovery, and now confirmed
2 through plaintiff's answer to discovery, they do consider my
3 client as a possible liable party for the HP Delta site that's
4 the trial site at issue, that we may want to produce separate
5 expert reports in the third-party action.

6 THE COURT: All right. Again, we are rounding it up.
7 We're at November 1st. You want three months from now to start
8 the process. Why do you need three months? And what are these
9 experts on? The proposal is third-party plaintiff to serve
10 expert reports. Expert reports on what? What kind of experts?

11 MS. DEAN: As to the contamination at issue at the
12 site. Very specifically there's an issue --

13 THE COURT: So that's not awaiting any further
14 discovery, the expert could be working on that today.

15 MS. DEAN: Absolutely, your Honor.

16 THE COURT: Why can't we tighten this schedule, which
17 also runs too long, it runs until June. It's only
18 November 1st.

19 MS. DEAN: And I agree with you. After submitting it
20 to your Honor and looking at the dates, the original dates were
21 based upon the final deadline for the plaintiffs to submit
22 their rebuttal reports, but I think that we could move the date
23 and agree that we will produce our expert report as to the
24 third-party claims on the same day that the defendants cite
25 specific --

CAMTMB2

1 THE COURT: Which is when?

2 MS. DEAN: January 7, your Honor.

3 THE COURT: That's just what I was going to suggest
4 without even knowing that. January 7.

5 And then the defendants could respond -- why can't
6 they respond in a month?

7 MS. DEAN: They asked to have 60 days because --

8 THE COURT: Because that's what lawyers do, they ask
9 for the most amount of time they think the Court will go along
10 with. I don't see why they need 60 days, why can't they do it
11 in 30 days?

12 MS. DEAN: If I may, your Honor, I believe they asked
13 for 60 days because in the original CMO the defendants are
14 provided 60 days to respond to the plaintiffs' site specific
15 report.

16 THE COURT: But they're responding to many more sites.
17 How many sites are we talking about?

18 MS. DEAN: Just one.

19 THE COURT: Exactly, that's the difference.

20 Are you for one of the third-party defendants?

21 MR. SINKEVICH: Yes, your Honor, good afternoon,
22 Michael Sinkevich on behalf of HP Delta, Incorporated.

23 THE COURT: Right. I don't see why you can't get this
24 done in 30 days by February 8.

25 MR. SINKEVICH: We understand, your Honor.

CAMTMB2

1 THE COURT: Then the rebuttal report, surely another
2 month is fine, that would be March 8.

3 MS. DEAN: Absolutely.

4 THE COURT: That's a weekday, March 8 for the
5 rebuttal. And so the deadline to complete expert discovery is
6 another month, so that leaves the time for depositions to be
7 complete. Is that what the additional --

8 MS. DEAN: Correct, your Honor.

9 THE COURT: So that's April 8, also a weekday.

10 So we picked up 60 days in the schedule and that's
11 done. We'll put that in our order.

12 MS. DEAN: Very good.

13 MR. SINKEVICH: Thank you.

14 THE COURT: And that takes to us to City of Fresno.

15 At the last conference I ordered the city to produce a
16 matrix with three categories of stations: those to which the
17 city asserts claims and the particular defendants against which
18 those claims are being asserted per site; second category,
19 those to which the city's expert concluded that no further
20 remedial and/or clean-up action necessary, and therefore, as I
21 understand, are going to be dismissed with prejudice; and those
22 to which the city's expert lacks sufficient information to form
23 an opinion.

24 The defendants are requesting, and the plaintiffs
25 don't object, to a case management order that incorporates

CAMTMB2

1 plaintiff's three charts. And this case management order would
2 reflect the agreement of the parties to dismiss the stations
3 that were in the second category, that is, there's no further
4 remedial and/or clean-up action necessary. But there's a
5 disagreement as to whether the third category should -- the
6 dismissal in the third category, that is, those which the
7 city's expert lacks sufficient to form an opinion, should be a
8 dismissal with prejudice or without prejudice.

9 It seems to me that if there's no claim for damage,
10 there's no to reason to dismiss with prejudice. When and if
11 there's a lawsuit, you'll handle it. You could handle it by
12 saying it's time barred, you should have known years ago, or I
13 don't know what they the other "ors" are. There's not enough
14 evidence now to be dismissed as a matter of law or that summary
15 judgment, so I don't see why it should be with prejudice
16 dismissal when they're essentially saying there's no
17 information now to sustain a claim and so we're dropping it for
18 now and you can always, when and if they ever bring it, you can
19 certainly assert time or latches or anything else you want to.

20 Mr. Parker.

21 MR. PARKER: Thank you, your Honor.

22 On that issue, with respect to the third category,
23 these are sites that were specifically identified by the
24 plaintiff as being in this case, and there was a lot of
25 discovery. So it's akin to an attack by the defendants at the

CAMTMB2

1 end of the case for a lack of causation, for instance, if we
2 were to file a motion for summary judgment on lack of
3 causation, because they have not --

4 THE COURT: It may be akin, but there's a difference.
5 You're not required to file a motion. It's not the end of the
6 case. They're voluntarily dismissing them maybe a year in
7 advance of the final date in this case. I don't know what the
8 final New Jersey date is, you told me it was endlessly long,
9 but whatever is the final, final date, it's a ways off, so it's
10 a big difference. It may be akin that you had to move and win
11 maybe with prejudice, but what they're saying is we understand
12 we don't have a case now, if and when we ever do, we will bring
13 it and you will have all the defenses in the world.

14 I have a feeling this is the big one, so to speak.
15 We'll all learn a lot from the way it's resolved, by motion, by
16 verdict, by settlement. I don't know that you will ever see
17 that other case, so I think we may be worrying about an issue
18 that may not be an issue down the road, but we'll find out. If
19 and when they bring a lawsuit, I'm sure you will defend it
20 vigorously, but I don't see the purpose of "with prejudice"
21 now.

22 MR. PARKER: That's what we would want the opportunity
23 to brief.

24 THE COURT: Why do I need more paper in my life? Look
25 at the desk. I really don't need it. I don't see the big

CAMTMB2

1 difference to you right now. I already predicted the future,
2 it could be wrong. I don't think you'll ever see that lawsuit.
3 One of us will be right and one of us might be wrong, but we'll
4 see. Why worry today? We have a lot to do. You have a lot to
5 do in New Jersey, a lot to do in Puerto Rico, it's not an
6 issue. The first time they try to file, there's an issue. If
7 they do, worry about it.

8 MR. PARKER: But these are items that they have
9 already identified and gone through, and that's why we think
10 it's different than --

11 THE COURT: But people voluntarily dismiss claims all
12 the time. They bring claims and voluntarily dismiss claims.
13 It happens in many lawsuits big and small. I'm only saying:
14 Where's the prejudice? Maybe you know where the prejudice is.
15 Maybe you have already done discovery on some of these sites,
16 spent time and money, or maybe you haven't.

17 MR. PARKER: We have done full discovery on all sites,
18 which is why --

19 THE COURT: These were trial sites?

20 MR. PARKER: This is Fresno where we do not have trial
21 sites. We have identified sites that they picked, and then
22 they added sites to their list and your Honor said OK, you get
23 time to do discovery on those. We have had full fact discovery
24 and full expert discovery on these sites. Maybe I wasn't
25 clear.

CAMTMB2

1 THE COURT: I'm sure that's my fault, I have a lot
2 going on.

3 MR. PARKER: That's why I was analogizing it to the
4 summary judgment. Because we're at the post-expert phase,
5 post-fact discovery phase of this case, and at some point that
6 would be the attempt to get rid of these. That's why there are
7 the three categories.

8 THE COURT: I understand that. They're paring down
9 the lawsuit, which is generally perceived as a good thing, and
10 the second category is dismissed with prejudice. You're
11 worrying about this third category, and I'm thinking if there's
12 no evidence, there's no evidence. If there's ever evidence,
13 they may choose to bring a lawsuit and you may have very strong
14 defenses to that.

15 What's your position, Mr. Axline? I hadn't fully
16 appreciated there's been so much time and money spent on
17 discovery, now you want to walk away with no penalty
18 essentially. And one could talk about Rule 11 saying you
19 shouldn't have pressed the case which you didn't have evidence
20 in the first place, so they could trade that up for a dismissal
21 with prejudice.

22 So what is your position? You brought the lawsuit,
23 now you say so sorry, we really don't have any evidence of
24 harm. Sorry we put you through this for a year and a half,
25 sorry you spent money on discovery, but that's the way it is.

CAMTMB2

1 MR. AXLINE: Well, with respect to Fresno, your Honor,
2 there were quite a few sites in the city, and in an excess of
3 caution we identified all those where there was some evidence
4 of MTBE.

5 THE COURT: Some evidence, but apparently not enough
6 to make a case, and they spent a lot of time.

7 MR. AXLINE: I wouldn't say a lot of time.

8 THE COURT: Mr. Parker thinks it's a lot of time, and
9 apparently his client does.

10 MR. AXLINE: Well, I suspect if he wants to make that
11 case, we can brief that. We're offering to dismiss these
12 without prejudice and take them out of the case.

13 THE COURT: But not take them out of the case
14 permanently, you're saying if the harm ratchets up and it
15 suddenly crosses a certain threshold, you want to bring them
16 right back in.

17 MR. AXLINE: It would not be the same case, your
18 Honor. We would have to file a completely different case and
19 identify new sites. There may be some sites --

20 THE COURT: New sites? I didn't understand that. I
21 thought it would be the same sites that you would say now we
22 have the evidence, we're bringing those sites back in. So then
23 if you're going to bring in new sites, you should dismiss the
24 old sites with prejudice because you're saying I don't intend
25 to bring the old sites back, I'm going to bring in new sites.

CAMTMB2

1 MR. AXLINE: Well, maybe I misspoke. What I meant was
2 a new case with new evidence.

3 THE COURT: On the old sites, on the same old sites.

4 MR. AXLINE: Yeah.

5 THE COURT: That's right. That's what I thought. And
6 he is saying that isn't entirely fair, is it? Why are they
7 allowed to walk away for free, essentially?

8 MR. AXLINE: Well, we're not walking away for free,
9 your Honor, we're losing the sites.

10 THE COURT: Only for now. You could bring it back two
11 months from now if the evidence sort of appears. If things
12 change, you can bring it back. So they're saying you really
13 are walking away at no cost, no cost to you for having brought
14 a case where you say in excess of caution I brought it because
15 maybe it was too little, below the thresholds, but I wanted to
16 to be sure if there was a trace that I did.

17 That's why I said to Mr. Parker in the first place he
18 could probably have a good statute of limitations argument when
19 and if you decided to bring these, because he could say as
20 proof that you knew of the harm, you filed this lawsuit back
21 in -- I don't know what year the Fresno case is, but 2007, now
22 you are bringing it for the first time in 2014, you're barred.
23 I don't know that he's in that much risk either, but it seems
24 odd to me you'll ever do that, but OK.

25 MR. AXLINE: I don't think that we are, frankly, your

CAMTMB2

1 Honor, but there's a big difference, obviously, between
2 dismissing with prejudice and without prejudice.

3 THE COURT: Right. One says you can't bring it even
4 if things change, the other says I will take my chances that
5 they will raise a defense that is successful.

6 MR. AXLINE: Frankly, one of the purposes of discovery
7 is to narrow the case.

8 THE COURT: Well, it's true, but the discovery in our
9 system is not there to make a case. You're supposed to have
10 evidence of a harm before you file a complaint. That's very
11 clear in our jurisprudence. You can't just bring a case
12 without the evidence. So discovery might show there's no harm,
13 generally that would be a dismissal with prejudice. What
14 you're saying is I'm entitled to try again whenever the
15 evidence changes.

16 MR. AXLINE: But not in this case, your Honor.

17 THE COURT: Not in this what?

18 MR. AXLINE: Not in this case.

19 THE COURT: I understand, but you file a separate case
20 tomorrow, what's the difference if it's this case or another
21 case?

22 MR. AXLINE: Well, the difference is that if it was a
23 new case it would be based on new evidence. And as you said,
24 the defendants would be able to argue whatever they want to
25 argue in terms of statute of limitations. We didn't fight them

CAMTMB2

1 on the sites where you suggested and they argued that we
2 dismissed with prejudice because our expert had been able to
3 reach an opinion. But I think if the Court is unsure about
4 this category, we join with the defendants in asking for
5 briefing on it.

6 THE COURT: I think that's such a wasted effort, I
7 must say, on everybody's side, I must say. But it's important
8 enough for you to want to brief it?

9 MR. AXLINE: Yes, your Honor.

10 THE COURT: Even though you suspect you will never
11 bring a case, that's your own suspicion. I know you're on the
12 record, I realize that, but I think you said it already anyhow,
13 so you don't need to say it twice. You will read the
14 transcript. I think you did. Be that as it may.

15 MR. AXLINE: Your Honor, I think the fair resolution,
16 your instinct was the last conference, I think your instinct
17 was at this conference, the plaintiff dismiss these without
18 prejudice, we're willing to do that.

19 THE COURT: Of course you're willing to do that.
20 There's no cost to you.

21 What kind of costs have you incurred on these,
22 Mr. Parker?

23 MR. PARKER: Your Honor, I have not tried to calculate
24 that, amongst all the defendants, but we are looking at eleven
25 sites. We went through depositions --

CAMTMB2

1 THE COURT: Eleven sites fall in this category three?

2 MR. PARKER: Yes.

3 THE COURT: How many are going to remain in the case?

4 MR. PARKER: I believe there are --

5 THE COURT: There was out of --

6 MR. PARKER: -- fourteen left in, so this is an
7 equivalent amount of discovery as the ones left in the case.

8 Fairly close to it. And for these --

9 THE COURT: What about that number two category?

10 MR. PARKER: Sorry, your Honor, so that I think was
11 seven, so a third -- more than a third of the case was spent
12 doing discovery on these sites, and that meant operators, at
13 some stations there were more than one operator, it meant
14 regulators, it meant defendants having their experts have to
15 analyze these. There was a significant amount of work. I have
16 not calculated it, but I know that it was very significant in
17 terms of the whole case and discovery on the whole case.

18 MR. AXLINE: Your Honor, all sites are not created
19 equal. These were sites with marginal -- at least at an
20 initial marginal MTBE detection. Most of the efforts were
21 focused on the sites that remain in the case.

22 THE COURT: I understand it's not proportional to the
23 number, you can't say 11 out of 20 or -- yeah, 11 one side of
24 the ledger and 21 on the other, you can't do it that way
25 because you're saying there was less work to do on these 11 by

CAMTMB2

1 far than the 14 that remain.

2 MR. PARKER: And your Honor, I don't have the numbers,
3 I was trying to give some measure of the number of cases or the
4 number of sites, but I know for instance there are several --
5 there's a Dave's Exxon, there's a Shell, there's a Texaco. For
6 all the stations multiple operators were deposed at length.

7 THE COURT: That discovery wouldn't go to waste
8 totally. If they ever did bring a case, that could be used.
9 Why would that change?

10 Not that I think they will bring a case, as I said
11 three times already, and I think you would have strong defenses
12 to it, but putting all that aside, if it did go forward for
13 some reason, why would this discovery not be able to be used?

14 MR. PARKER: Well, the factual discovery as to the
15 operators probably could be used. With respect to the
16 environmental discovery related to the regulators and the
17 consultants and the experts, if they're doing a do over
18 supposedly based on them going out to do work -- and that's the
19 only way they would get this other data is if they went out and
20 developed it. They sued claiming there was injury, they went
21 and did certain station specific fact discovery on operations,
22 deliveries and the like and affiliations with the operators,
23 but the environmental discovery is what it comes down to. And
24 if they're doing it again, that means they're essentially
25 getting a do over there. And the point is we have done a

CAMTMB2

1 significant amount of work here and they want a free pass to
2 bring it. And if there are other sites, that's a different
3 story.

4 THE COURT: I understand. That's if there are other
5 sites, of course that's different.

6 So we never confronted this exact question before in
7 this MDL, or have we? I feel like we have.

8 MR. AXLINE: Your Honor, I think we have in the Orange
9 County Water District case and we ended up dismissing some of
10 the sites voluntarily without prejudice as basically not ripe.
11 I think that was the basis.

12 THE COURT: And that was after a period of time,
13 including some discovery on those sites?

14 MR. AXLINE: Yes.

15 MR. PARKER: I believe that's not correct, your Honor.
16 There was -- initially they identified based only on geography
17 sites and proximity to a well, and then your Honor ordered
18 Orange County Water District to identify focus plumes and they
19 identified pairs. That's the point where then the discovery
20 took off on the focus plumes. There were designations that
21 were due and then discovery.

22 THE COURT: But dismissals of some sites without
23 prejudice, or you said you're not sure that's correct, you want
24 to look into that?

25 MR. PARKER: They definitely dropped sites.

CAMTMB2

1 THE COURT: Without prejudice.

2 MR. PARKER: But without discovery, without doing any
3 work other than listing them on a plume list, because that case
4 started with a list of 400 focus plumes and no discovery.

5 THE COURT: So the big difference here is that you
6 have done discovery.

7 MR. PARKER: Right. We worked up the case, and it's
8 at the point of them being unable to prove causation.

9 THE COURT: Well, we have one topic left, which also
10 relates to City of Fresno, but as I said, the materials are
11 coming late and it's also late in the afternoon. So what I'm
12 thinking is that these are two issues I should hear more about,
13 and you will have a chance to research the statement that
14 Mr. Axline just made that you said you didn't think was
15 correct, he made certain representations. You could have a
16 little more information about what was done in the past in the
17 Orange County case.

18 We could go again over this Dr. Rudo or Dr. Tan
19 problem, because materials were coming in at the last minute
20 that I haven't had a chance to review. And I know that
21 plaintiffs' counsel generally comes in from California, they
22 would be reduced to doing it by phone at the next available
23 date, those two City of Fresno issues, and that would end
24 today's conference today I think without a ruling on either of
25 those two. So the first day that I have any time, as I said in

CAMTMB2

1 the previous trial, was November 5th or 6th, that week is a
2 good week, no trial that week for the first time in a long
3 time. So I don't think -- November 6 is fine.

4 MR. PARKER: Your Honor, on that point, the two items
5 that came in, one of them was submitting the e-mail that
6 Dr. Rudo relied on, and then the other was the Angelos firm, I
7 read it on my phone before coming in, so I can't quote it
8 verbatim, but essentially talking about that and saying Dr. Tan
9 didn't really do this analysis. I think those are not issues
10 that go to the core of what we have here, which is Dr. Rudo
11 relying on someone outside of his specialty. I think they
12 actually --

13 THE COURT: I already ruled on that. I said either he
14 can give these opinions without any reference to Dr. Tan or he
15 can't. If he relies on Tan at all, Tan has to be deposed. If
16 he really can give an opinion that cuts out whatever it is Tan
17 gave him, then that's fine, but I think then you tried to
18 redact and you couldn't agree on anything.

19 MR. PARKER: Right. The core of that was from our
20 perspective, Dr. Rudo said he's not a statistician and
21 everything related to the pathology work under PWG and statics
22 related to that are outside his expertise. It's clear in his
23 deposition that he says he doesn't have that expertise, he
24 relied on Tan. Those are the sections that we went through and
25 attempted to excise. Plaintiffs gave us seven words in the

CAMTMB2

1 first draft and seven words plus one sentence in their second.
2 They want to delete the name, which your Honor said on the
3 phone on September 11 that is so transparent, we think that is
4 so transparent. There are sections that talk about the
5 statistics --

6 THE COURT: Do I have the two proposed redacted
7 versions, yours and theirs?

8 MR. PARKER: Yes, your Honor, if you look at --

9 THE COURT: I can't --

10 MR. PARKER: I don't mean now, but to identify for the
11 record where it is. It is on defendant's letter of October 12,
12 so that's our opening 72-hour letter, Exhibit L, and it's noted
13 as combined mark up showing the plaintiffs' and the defendants'
14 deletions. And the one other sentence that they have added is
15 not marked. I can submit, your Honor, an updated mark up for
16 you that will identify the two -- the one clause and the one
17 sentence.

18 THE COURT: After I do find the time, which won't
19 happen until the week of November 5th, to really look at it, it
20 may be that plaintiffs are going to have a choice. They're
21 either going to take your version, which really cuts out
22 everything that Rudo says that relies on somebody else, or have
23 this deposition. It may be whatever comes down.

24 So I suggest that we have a conference on November 6th
25 at 11 o'clock. And because of Mr. Axline's travel, I will do

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1 it by phone. I don't usually like the phone, but it's limited
2 to the City of Fresno case.

3 MR. AXLINE: Thank you. And FYI, there may have been
4 a development this will make this unnecessary.

5 THE COURT: That will be good.

6 MR. AXLINE: I will give you as much advance notice as
7 possible.

8 THE COURT: That would be great, but I still will
9 probably have the conference to continue the argument about the
10 dismissal of certain sites in the Fresno case, particularly
11 after -- Mr. Parker can read the transcript of your statement
12 and see if it is accurate or not when I asked you: Hasn't this
13 come before? And you said it did in Orange County. He
14 distinguished it, but he also indicated that he might want to
15 check into some facts. So we will probably have that telephone
16 conference on the 6th at 11:00, but it will be really nice if
17 this Dr. Tan issue went away.

18 MR. AXLINE: I will go back and look at that. I gave
19 you my best recollection of what happened in the Orange County
20 case.

21 THE COURT: You did. You also may have good news on
22 the Dr. Tan situation, possibly.

23 MR. AXLINE: Yes.

24 THE COURT: Let me put down the telephone conference.

25 Do we have a next date for an all-issues conference?

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1 Do we have a new date for all issues, if we need another?

2 MR. PARDO: We don't have one yet.

3 THE COURT: Do you think we need one in a month, or is
4 that too soon?

5 I have to issue the case management order for Puerto
6 Rico. I said I would just consider it and come up with
7 something. That's one left over from today, and a couple of
8 other things. One you put in front of me to sign, one I said I
9 adjusted some dates on the third-party thing and said I would
10 issue it as an order.

11 MR. AXLINE: We will be adding new parties, your
12 Honor, you said by December 1st, and --

13 THE COURT: Whatever I said here will find its way
14 into the order. We take the transcript and pull out the
15 rulings.

16 MR. AXLINE: There may be issues surrounding that.

17 THE COURT: What was the date I said you should do
18 that by?

19 MR. AXLINE: December 1st.

20 THE COURT: Do you think we should plan a conference
21 for either November or December or skip all the way to January?

22 MR. PARDO: Your Honor, I think we do well scheduling
23 these. We can always cancel, and the existence of a conference
24 is, for both sides, an incentive.

25 THE COURT: Good.

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1 MR. AXLINE: Maybe the first week of December, if
2 that's available.

3 THE COURT: That would take us away from Thanksgiving.
4 Maybe Wednesday, December 5th, because I expect to
5 have a trial first two days, and then I'm out of town the last
6 two days, so that would sandwich it in the middle if the trial
7 ends. I would say 12 noon on Wednesday, but we'll be in touch
8 if the trial schedule makes that difficult.

9 OK? So that is scheduled subject to cancellation if
10 you have no issues ready.

11 MR. PARDO: Right.

12 THE COURT: We'll see. Then we can always pick
13 another date anything else today.

14 MR. PARKER: Just, your Honor, I assume you want me to
15 submit that combined mark up.

16 THE COURT: That would be helpful.

17 MR. PARKER: I will do that. Then we have the agreed
18 order for the first set of stations. Should I give that to
19 your clerk?

20 THE COURT: Sure.

21 Anything further today?

22 MR. PARDO: I don't think so.

23 THE COURT: Thank you.

24 MR. AXLINE: Thank you.

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